Office Supreme Court, U. S.
FILED
JAN 9 1931
CHARLES ELMORE CROPLEY
CLERK

FILE COPY

No. 88

In the Supreme Court of the United States

OCTOBER TERM, 1930

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Specification of errors to be urged	13
Summary of argument	14
Argument:	
I. The court had no jurisdiction to set aside a report of the commission unaccompanied by an order	19
II. The courts have no jurisdiction to rewrite an order of the commission after the authority granted by the order has been exercised	26
III. The report of the commission was a correct and lawful interpretation of the prior order	30
Conclusion	45
Appendix (interstate commerce act, secs. 1 (18), (20); 19a (1); 20 (1), (5), (6); 20a (2), (3))	46

CITATIONS

Cases:	
American Sugar Refining Co. v. *Delaware, L. & W. R. R. Co.*, 207 Fed. 733	22
Brady v. *Interstate Commerce Commission*, 43 F. (2d) 847	23
Chicago, B. & Q. R. Co. v. *Merriam & Millard Co.*, 297 Fed. 1; certiorari denied, 265 U. S. 592	22
Chicago Junction Case, 264 U. S. 258	27
Federal Trade Commission v. *Pacific Paper Ass'n.*, 273 U. S. 52	31
Hooker v. *Knapp*, 225 U. S. 302	30
Kansas City Southern Railway v. *United States*, 231 U. S. 423	22, 28, 29
Lehigh Valley Railroad Co. v. *United States*, 243 U. S. 413	25
Lucas v. *Alexander*, 279 U. S. 573	31
Procter & Gamble v. *United States*, 225 U. S. 282	30
United Railways v. *West*, 280 U. S. 234	44
United States v. *Los Angeles & Salt Lake Railroad Company*, 273 U. S. 299	25

32187—31——1

Page

Cases—Continued.

United States v. *New River Co.*, 265 U. S. 533..... 21, 22

Venner v. *Michigan Central Railroad*, 271 U. S. 127..... 27

Virginian Railway v. *United States*, 272 U. S. 658..... 44

Statute:

Interstate commerce act—

Section 1 (18), (20)—(C. 91, 41 Stat. 477, 478; U. S. C., title 49, secs. 1 (18) (20).)..... 46–47

Section 19a (i)—(C. 92, 37 Stat. 703; c. 91, 41 Stat. 493; U. S. C., title 49, sec. 19a (i).)..... 47

Section 20 (1), (5), (6)—(C. 104, 24 Stat. 386; c. 3591, 34 Stat. 593; U. S. C., title 49, sec. 20; c. 3591, 34 Stat. 594; c. 91, 41 Stat. 493, 494; U. S. C., title 49, secs. 1 (5), (6).)..... 48–50

Section 20a (2), (3)—(C. 91, 41 Stat. 494, 495; U. S. C., title 49, sec. 20a (2), (3).)..... 50–51

In the Supreme Court of the United States

OCTOBER TERM, 1930

No. 88

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, appellants

v.

ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

BRIEF FOR THE UNITED STATES AND THE INTERSTATE COMMERCE COMMISSION

OPINIONS BELOW

The opinion of the specially constituted District Court upon the original bill and hearing (R. 220) is reported in 28 F. (2d) 885. The opinion of that court upon supplemental bill and hearing (R. 499) is reported in 37 F. (2d) 401.

The three reports of the Interstate Commerce Commission (R. 311, 320, 486) are reported in 117 I. C. C. 181, 117 I. C. C. 439, and 158 I. C. C. 6.

JURISDICTION

The final decree of the District Court was entered January 18, 1930. (R. 503.) Petition for appeal

was filed March 1, 1930, and allowed on the same day. (R. 504, 506.) The jurisdiction of this Court rests on the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U. S. C., Title 28, Sec. 47), and Section 238 of the Judicial Code as amended by the Act of February 13, 1925, c. 229, 43 Stat. 936, 938 (U. S. C. Title 28, Sec. 345).

QUESTIONS PRESENTED

The questions presented are:

(1) Whether a report of the Interstate Commerce Commission, dated October 9, 1929, constitutes an order subject to review under the Urgent Deficiencies Act of October 22, 1913.

(2) Whether the District Court had jurisdiction to emasculate a condition contained in an order of the Commission, dated December 21, 1926, where the effect would be to substitute its judgment for that of the Commission.

(3) Whether the value of a road acquired under a plan of reorganization is material to the determination of the accounting entries to be made by the acquiring carrier as its investment in such road within the meaning of the Commission's accounting rules and order of December 21, 1926, requiring such entries to be made at cost.

STATUTE INVOLVED

The pertinent provisions of the Interstate Commerce Act are set forth in the Appendix, *infra* pp. 46–51.

STATEMENT

This appeal was taken from a decree of the District Court for the Northern District of Georgia setting aside a *report* of the Interstate Commerce Commission which fixed the maximum amounts at which the appellee might record in its balance sheet certain items credited to "Investment in Road and Equipment" and certain charges to "Capital Stock."

In January, 1927, appellee, under a Plan of Reorganization of February 23, 1926, acquired title to railroad properties previously owned by Atlanta, Birmingham & Atlantic Railway Company (hereinafter termed A., B. & A.). (R. 8.) A., B. & A. had become owner of the road in 1914 under a reorganization devised to remove it from a receivership under which it had operated since 1909. (R. 35.) At this time, 1914, a previous capitalization of $35,000,000 stock and $14,500,000 bonds was wiped out and A., B. & A. took the property subject to $4,090,000 first mortgage bonds of an old issue. (R. 177.) A., B. & A. then issued additional income bonds and stock. Beginning with 1918, A., B. & A. incurred yearly operating deficits which mounted until the road was again placed in receivership on February 25, 1921. (R. 177, 288.) No dividends were ever paid on A., B. & A.'s $30,000,000 par value common stock which was issued at $12 per share (producing $3,600,000), and subsequently sold below $1 per share. (R. 164.) Due to its lack

of traffic, the road could not be successfully operated as an independent property. (R. 178, 179.)

In 1921, separate bondholders' committees were organized for the first mortgage bonds and income bonds. Various proposals were considered by the committees, among them the possibility of scrapping the road. (R. 164, 165, 166.) Atlantic Coast Line Railroad (hereinafter termed Coast Line), finally became interested in the road and with the committees, on February 23, 1926, entered into a plan for the reorganization of the road. (R. 91.)

The Plan of Reorganization provided for the organization of a new company to acquire title after foreclosure of the railroad property. The authorized capital stock of the new company was to be $5,200,000 preferred stock, and 150,000 shares common stock without par value. The preferred stock was to have par value of $100 per share and to be entitled to 5% cumulative dividends and on liquidation to $100 plus accrued dividends. Coast Line, by separate agreement with the committees, was to guarantee to pay dividends upon and to redeem the preferred stock on liquidation. The preferred stock was to have no voting rights except on default in dividends. Holders of both classes of bonds of A., B. & A. were to be entitled to receive shares of the new company's preferred stock in the ratio of $60 par value of preferred stock for each $100 of bonds deposited under the Plan. (R. 91–94.) Approximately $8,600,000 of bonds of both issues were

outstanding. (R. 174.) Coast Line agreed with the committees to furnish cash (estimated to be $3,677,500, R. 90) to retire the prior obligations, consisting chiefly of receivership debts. (R. 83, 90). No provision was made under the Plan for the stockholders of A., B. & A. Coast Line was to be entitled to the entire issue of 150,000 shares of common stock, without par value, in return for cash which it was to provide to pay debts having priority over the bonds.

On April 8, 1926, the reorganization committee, pursuant to Sections 1 (18) and 20 (a) (2) of the Interstate Commerce Act, filed an application, on behalf of the proposed new company, for a certificate of public convenience and necessity and for authority to issue the preferred and common stock. (R. 223.) On April 12, 1926, Coast Line filed an application under Section 5 (2) of the Interstate Commerce Act for authority to acquire control by the purchase of all of the common stock of the new company, and under Section 20 (a) for authority to assume guarantees with respect to its preferred stock. (R. 448.)

On April 30, 1926, the United States District Court for the Northern District of Georgia entered a decree of foreclosure and sale of the property of A. B. & A. (R. 31.) The upset price fixed by the court was $2,500,000. (R. 55.) On June 22, 1926, pursuant to the decree, the property was sold, subject to certain charges (to be assumed by Coast Line under the Plan), to the reorganization com-

mittee for $4,500,000. (R. 135, 137.) The bid was conditioned on the approval by the Interstate Commerce Commission of the Plan. (R. 138.) This sale was confirmed by the court on June 23, 1926. (R. 140.)

On May 20, 1926, the Commission held hearings on the applications of the reorganization committee. (R. 162–203.) A witness for the Plan explained that it contemplated the sale of the common stock of the new company to Coast Line for the cash required to lift the receivership. (R. 169, 170.)

On October 26, 1926, the Commission rendered a report and order granting a certificate of public convenience and necessity to the reorganization committee, and deferred action upon its application to issue stock and upon Coast Line's application to acquire control and to assume guarantees until the new company should be organized. (R. 312, 319.) In its report, the Commission stated (R. 317):

> The statement of the investment accounts of the new company has not received consideration by the applicants, but they indicate their willingness to submit to such reasonable restriction as we may prescribe.

On November 16, 1926, the District Court ordered that a deed to the properties be delivered to the reorganization committee, and the appellee, Atlanta, Birmingham & Coast Railroad Company, was granted a charter under the laws of the State of

Georgia. (R. 6.) The appellee, on November 25, 1926, filed with the Commission an application for a certificate of public convenience and necessity and for authority to issue stocks, adopting as its own the application previously filed by the reorganization committee. (R. 229.)

On December 21, 1926, the Commission rendered a report and order granting to appellee authority to issue (a) $5,180,344.07 preferred stock, par value $100 per share, and (b) 150,000 shares of common stock without par value. (R. 320, 324.) It also authorized Coast Line to acquire control of appellee by purchase of its common stock and to assume obligations as guarantor of appellee's preferred stock. The material portion of the Commission's order relating to appellee's accounts is as follows (R. 324):

> It is ordered that the Atlanta, Birmingham & Coast Railroad Company be, and it is hereby, authorized to issue not exceeding $5,180,344.07 of its preferred capital stock and not exceeding 150,000 shares of its common capital stock without nominal or par value; said preferred and common stock to be used for the purposes specified in the application recorded under Finance Docket No. 5454 and in the report aforesaid: Provided, however, that authority to issue said stock is granted upon the express condition, that, for the purposes of the accounting, as provided in the classification of investment in road and equipment in the text

> of account 41, "Cost of road purchased," the cash value of the preferred stock issued must, in stating the transactions in the accounts, be reckoned on a basis not in excess of its par value; and that the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor.

The Commission's applicable accounting rules,[1] promulgated pursuant to Section 20 (5) of the Interstate Commerce Act, are contained in its "Classification of Investment in Road and Equipment of Steam Roads." (R. 407.) The appropriate instructions are:

> 1. *Accounts for Investment in Road and Equipment.*—The accounts prescribed in this classification are designed to show the investment of the carrier in property devoted to transportation service. * * * *The carrier* means the accounting carrier,

---

[1] The Commission's Classification of Income, Profit and Loss, and General Balance Sheet Accounts (R. 339) contains the following rules regarding balance sheet entries:

701. *Investment in Road and Equipment* (R. 381).—This account shall include the accounting company's investment in road and equipment (including that held under contract for purchase) in existence at the date of the balance sheet.

751. *Capital Stock* (R. 388, as amended, R. 403).—This account shall include the total value as herein provided of certificates or receipts issued to represent permanent interests in the accounting company * * *.

When such certificates or receipts have no par value they shall be included in this account at the amount corresponding to the cash received, or the cash equivalent if the consideration is other than cash. * * *

except when otherwise specifically indicated. (R. 415.)

* * * * *

3. *Basis of Charges.*—The charges to the accounts of this classification shall be based upon the cost of the property acquired. When the consideration given for the purchase or the improvement of property the cost of which is chargeable to the accounts of this classification is other than money, the money value of the consideration at the time of the transaction shall be charged to these accounts, and the actual consideration shall be described in the record in sufficient detail to identify it. The carrier shall be prepared to furnish the Commission, upon demand, the particulars of its determination of the actual cash value of the consideration, if other than money. (R. 416.)

The Classification of primary accounts prescribes the following rule (R. 435):

41. *Cost of Road Purchased.*—This account shall include the cash cost of any road or portion thereof purchased. Where the contract of purchase includes not only road, but also equipment, securities, and other assets, the appraised value of such equipment, securities, and other assets shall be deducted from the total cash cost, and the remainder of the cash cost shall be charged to this account. *Where the consideration given for the property purchased is other than cash,*

such consideration shall be valued on a current cash basis. * * * (R. 435.) Italics ours.)

Following the entry of the Commission's order of December 21, 1926, appellee acquired title to the A., B. & A. properties from the reorganization committee and issued $5,180,344.07 of its preferred stock to the reorganization committee for distribution to the A., B. & A. bondholders in accordance with the Plan of Reorganization. (R. 8.) On the direction of the committee, it issued its 150,000 shares of no-par common stock to Coast Line after Coast Line had paid or provided for payment of the charges prior to the A., B. & A. bonds. (R. 8.) The charges paid or assumed by Coast Line totaled $4,080,699.80, which was slightly in excess of the amount estimated to be needed at the date of the Reorganization Agreement. (R. 90.) Pursuant to Section 20a (5) appellee filed with the Commission a certificate of notification of securities sold, in which the 150,000 shares of common stock, without par value, were stated to have been sold to Coast Line at a tentative value of $4,080,699.80.

Appellee in its opening balance sheet set up as "Investment in road and equipment" the amount of $29,471,859. (R. 17.) This credit entry was prepared on the assumption that appellee was entitled to perpetuate in its accounts the sum of money fixed by the Commission, as of 1914, as the amount on which A., B. & A. was entitled to earn

a fair return. (75 I. C. C. 645.) The Commission's Bureau of Accounts by letter of August 3, 1927 (R. 300), notified appellee that the above entry was not acceptable because based upon valuation (reproduction cost new) instead of cost. It advised the appellee that it would be necessary to consider $4,080,699.80 as the cash value of the 150,000 shares of no-par stock and directed appellee to reduce the proposed entry of $29,471,859 to this amount. In its certificate of notification to the Commission dated January 10, 1927, appellee had assigned $4,080,699.80 as the tentative value of the no-par common stock. (R. 337.)

On November 3, 1927, appellee filed an application with the Commission requesting a hearing in support of its contention that the proviso in the December 21, 1926, order authorized the accounting entries which had been submitted to the Bureau of Accounts. (R. 10, 289.) On April 9, 1928, the Commission acted upon this application as follows (R. 10):

> The Commission having under consideration the petition filed in the above entitled proceeding by the Atlanta, Birmingham & Coast Railway Company requesting oral argument on said petition, wherein it seeks a supplemental order authorizing it to set up in its books of accounts as the value of the property acquired by it at foreclosure sale of the Atlanta, Birmingham & Atlantic Railway Company entries charging its ac-

counts with the final valuation of the properties acquired, as fixed by us in Valuation Docket No. 1:

It is ordered that said petition be, and it is hereby denied.

On June 14, 1928, appellee filed its original petition in equity asking that this April 9, 1928 order of the Commission be set aside and that an order be issued authorizing it to set up its books in accordance with the 1914 valuation. (R. 1–16, 18.) On November 2, 1928, the specially constituted District Court decreed that the April 9, 1928, order be set aside and that the matters stand for further hearing before the Commission. (R. 222.) The court held in effect that the Commission should have allowed a hearing on the construction to be given the December 21, 1926, proviso. (R. 500.) On February 4, 1929, the Commission held a hearing at which appellee submitted a general balance sheet as of January 1, 1927, based on the Commission's valuation of A., B. & A. plus additions and betterments to date, setting forth its investment in road and equipment at $24,481,893.86. (R. 161, 488.)

On October 9, 1929, the Commission rendered a *report* which considered the proposed accounting entries, the Commission's accounting rules, and the December 21, 1926, proviso, and concluded (R. 486, 494):

Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet

> statement of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report.

The above sum, $9,261,043.87, is the total of two items—the issue of preferred stock, $5,180,344.07, and $4,080,699.80, the sum paid by the Coast Line to discharge the debts having liens prior to the bonds.

On November 20, 1929, appellee filed its supplemental bill. (R. 480.) The United States moved to dismiss the bill on the ground that the Commission had not issued an order giving jurisdiction to the District Court under the Urgent Deficiencies Act of October 22, 1913; and the United States and the Commission also answered on the merits. (R. 498, 495.) On January 18, 1930, the District Court entered a decree enjoining the enforcement of the Commission's "order" of October 9, 1929,[2] and ordered the supplemental application of appellee to stand for further hearing before the Commission. (R. 503.) From that decree this appeal is taken.

SPECIFICATION OF ERRORS TO BE URGED

The District Court erred:

(1) In holding that the report was an order subject to review under the Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, 220 (U. S. C., Title 28, Sec. 47).

[2] The court in its decree incorrectly referred to the order as dated October 29, 1929.

(2) In setting aside, annulling, and suspending the report of the Commission.

(3) In disregarding appellant's contention that the complaint should be dismissed for lack of jurisdiction in the court to act upon a condition in the Commission's certificate of December 21, 1926, separately from the certificate of which it was a part.

(4) In granting a permanent injunction restraining the enforcement, execution, and operation of the finding and report of the Commission "that the amount to be included in the balance sheet of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87."

(5) In decreeing that the supplemental application of appellee stand for further hearing.

(6) In holding that the value fixed by the Commission on the property of Atlanta, Birmingham & Atlantic (75 I. C. C. 645), was material evidence of investment and in confusing cost to appellee of acquiring the property with such value.

(7) In not dismissing the petition.

SUMMARY OF ARGUMENT

I. The present suit was premature since the Commission on October 9, 1929, entered no order requiring appellee to correct its accounting entries so as to conform with the Commission's findings and report. None of the reasons assigned by the lower court substantiate its conclusion that the report

was in fact an order. Similar reports stating that the Commission would "expect" the carrier to conform its action to the report have been held not to be orders. Final orders of the Commission have essential formal characteristics analogous to final judgments of the courts. Such characteristics are wholly lacking in this report. If it is said that this report derives its character as an order from the December 21, 1926, order of the Commission, then this suit is tardy since appellee's recourse was against that order.

Nor is there any basis for action under the general equity powers of the court. The Commission has made no attempt to use the figure here determined by it to be the cost to appellee of acquiring the road for the purpose of fixing rates, or of determining depreciation or recapturable income. And, the further contention that appellee would be subject to penalties under Section 20 (6) of the Interstate Commerce Act if it did not comply with the report, assumes that an order was, in fact, entered. Even if true, the penalties were imposed by the statute and not by the Commission's report.

II. Even if the Commission's report were construed as an order, it would seem that the court would not have jurisdiction to set the order aside where the effect would be to substitute its judgment for that of the Commission in determining what was meant by the Commission's order of December 21, 1926. The 1926 order contained a proviso

that the common stock issued by appellee should be valued for accounting purposes at "not in excess of the amount received therefor." The record indicates that appellee knew at the time of the insertion of this condition that its authority to issue stock was conditioned upon the entry of its common stock in its accounts at an amount not to exceed Coast Line's payments to creditors of the old road—which payments were required of Coast Line by the Plan of Reorganization as a condition to obtaining appellee's entire common-stock issue. It would seem obligatory upon appellee, if it considered such a condition to be unlawful, to have contested the 1926 order. If, in such contest, a court had found that the Commission could not attach such a condition to its authorization, the Commission upon further consideration of the Plan would have been in a position to determine whether the Plan was a proper one in view of the fact that the Commission could not eliminate the overcapitalization existing in the road's financial situation.

The lower court gave no intimation that a specific provision by the Commission that the common stock be valued at the amount Coast Line paid would have been unlawful, and it is believed that the Commission would have had authority under the Interstate Commerce Act to make such a condition. The sole question which the court considered appears to have been one of interpretation

of the Commission's intent. That would seem eminently an administrative question for the Commission to decide. The effect of the decision, then, is to rest appellee's authorization to issue stock on the judgment of the court rather than that of the Commission.

III. Appellee contends that this Court can not consider the correctness of the decision because no appeal was taken from the court's first decision. The view taken by the District Court answers this contention for its first decision was rested upon the failure of the Commission to grant a hearing, at appellee's request, upon the construction of the Commission's 1926 order.

The ruling of the court below that the cost to appellee of acquiring the road was the value of the road acquired resulted from an erroneous interpretation of the Commission's accounting rules and 1926 order as applied to the valuation of appellee's common stock. That valuation is necessarily reflected in the appellee's asset statement of "Investment in Road and Equipment." The purpose of this entry is to record the historical fact of the amount invested by a carrier in acquiring a road.

The cash value of the preferred stock issued under the Plan of Reorganization was determined by the lower court to be its par value. No objection to that valuation is raised by the parties to this appeal. The accounting rules and 1926 order of the Commission required the common stock issued

by appellee to be valued on a current cash basis. By virtue of the fact that such common stock was without par value, the lower court determined that its cash value should be arrived at by finding the present market value of the road and deducting therefrom the par value of the preferred stock—and this notwithstanding the fact that the road was acquired by virtue of the issuance of both classes of stock. The decision seems to turn on the incident that no par value or issue price was ascribed to the common stock.

Even on the court's theory that the value of the common stock was to be measured by the value of the road, there is ample evidence in the record that no disparity existed between the amount found by the Commission to be appellee's investment, or $9,261,043.83, and the present market value of the road. The court erred in holding that Section 19a (i) required that the Commission in 1926 accept its valuation of the road, as of 1914, as evidence of the market value of the road.

The failure of the Commission to attach any value to Coast Line's guaranty of appellee's preferred stock was not the basis of the lower court's decision. The reasons assigned by the Commission are sufficient to support its finding on that question.

The assertion that the figure determined by the Commission to be appellee's investment in the road will be prejudicial to appellee in future valuation proceedings, in fixing rates, and in determining

recapturable income and depreciation, is largely fanciful and lends no support to the court's decision.

ARGUMENT

I

THE COURT HAD NO JURISDICTION TO SET ASIDE A REPORT OF THE COMMISSION UNACCOMPANIED BY AN ORDER

Appellee's resort to the court to set aside the action taken by the Commission on October 9, 1929, was premature since the Commission entered no order requiring appellee to correct its accounts to conform with the findings of the Commission. The Commerce Court Act (c. 309, 36 Stat. 539) conferred upon the Commerce Court jurisdiction over "cases brought to enjoin, set aside, annul, or suspend in whole or in part any order of the Interstate Commerce Commission." The Urgent Deficiencies Act of October 22, 1913, c. 32, 38 Stat. 208, 219, transferred the jurisdiction of the Commerce Court to the several District Courts of the United States.

The portions of the report cited by appellee to support its contention that the report was in reality an order are its heading and its concluding paragraph, which are as follows: (R. 486, 494):

> Upon further hearing, application of Commission's accounting regulations to statement of the investment accounts of the Atlanta, Birmingham & Coast Railroad Company as of January 1, 1927, considered and *accounting prescribed.* * * *.

> Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. *The company will be expected to adjust its accounts in accordance with this finding within 60 days from service of this report.* (Italics ours.)

The lower court in upholding jurisdiction reasoned that though no formal order was entered the report was intended as such because otherwise the sixty-day clause would be meaningless; that it requested the Commission to postpone the effective date of the report which the Commission did without disclaiming its action as final, and that appellee attacked the report as constituting an order.

It is submitted that the reasons assigned furnished no basis for jurisdiction. To hold that appellee's attack on the Commission's action was ground for its classification as an order is to assume the question in issue. Nor can any weight be attached to the language of the headnote cited by appellee. That is less significant than the fact that the action of the Commission is not reported under the usual headings of "Report" and "Order." Further, it is the statute and not the failure of the Commission to disclaim finality of its action which furnishes the measure of the court's jurisdiction. The sixty-day clause could

not be meaningless as the court states unless ascribed to the Commission's intention to have its action followed by no formal order. Its context fairly implies that the Commission would grant to appellee sixty days within which it voluntarily might conform its accounts to the Commission's finding before the Commission would proceed to enforce its finding by formal order.

The mode of procedure here adopted by the Commission is not foreign to its practice. Carriers are frequently permitted to conform their practices voluntarily to the findings of the Commission without being subject to the penalties attendant upon the issuance of a formal order. In *United States* v. *New River Co.*, 265 U. S. 533, precisely that procedure was adopted. There a rule for car distribution was attacked before a Division of the Commission as being preferential of local mines and prejudicial to joint mines. The Division in its report found the existing rule unreasonable and concluded (p. 537):

> We have not required that car service rules be filed as tariff schedules. We will not in this proceeding direct that the rules which we herein find to be reasonable be so filed. We shall expect, however, that defendants will promptly amend their car service rules so as to conform with our findings and evidence same by filing copies thereof with us.

This Court said (p. 537):

> No formal order was entered, but the carriers amended their rules to conform to the findings in the report, and put in force and applied the 150 per cent rule.

While the question then presented arose out of a subsequent formal order of the full Commission dismissing the proceedings, and while the Court did not pass on the reviewability of the report, it differentiated between a formal order and a report precisely similar to that involved in this suit.

Reports of the Commission concluding that the carriers would be "expected" to conform their tariffs in accordance with the Commission's findings were held not to be orders in *American Sugar Refining Co.* v. *Delaware, L. & W. RR. Co.*, 207 Fed. 733 (C. C. A. 3d), and *Chicago, B. & Q. R. Co.* v. *Merriam & Millard Co.*, 297 Fed. 1 (C. C. A. 8th), certiorari denied, 265 U. S. 592. The force of these decisions is not destroyed by the fact that in suits for reparations by a shipper, he must point to a formal cease and desist order of the Commission declaring the existing tariff unduly preferential and compelling the publication of new rates. There is nothing in Section 20 of the Interstate Commerce Act to suggest that the action there taken by the Commission in prescribing the form of accounts can be made obligatory by any less formal procedure than the entry of an order. In *Kansas City Southern Railway* v. *United States*,

231 U. S. 423, the attack on the Commission's accounting requirements was directed against the regulations themselves, adopted by formal order of the Commission.

We submit that a report of the Commission is analogous to the opinion of a court. Until a judgment is entered by a court its decision can not be reviewed, and until an order is entered by the Commission the District Court has no jurisdiction under the Urgent Deficiencies Act. See *Brady* v. *Interstate Commerce Commission,* 43 F. (2d) 847, 850 (N. D. W. Va.). And in each case the distinction is found in the formal cast and mandatory language of the final action.

Appellee seeks to impart finality to this report of October 9, 1929, by an assertion that it must be read together with the order of December 21, 1926, which directed the common stock "to be reckoned on a basis not in excess of the amount received therefor." In appellee's motion before this Court to dismiss the appeal it is stated that "the present proceeding is as though that original order had been put back into force." If the 1926 order was deprived of its authority by the Court's first decree and was restored only by the Commission's interpretation in its report, then appellee is forced to take the position that the 1926 order originally prescribed that the stock be set up at an amount not in excess of $9,261,043. Yet appellee's first bill attacked only an order of April 9, 1928, which

denied it a hearing on its interpretation of what the 1926 order meant; and its theory of the bill (R. 11) and the court's first decision proceeded on the theory that the 1926 order was valid but had been erroneously construed by the Commission's accountants. But, even on the latter theory, it follows that if the report derives its character as an order from the 1926 order for enforcement purposes, it, in turn, supplies to that order its interpretative provision, namely, that the stock be set up at the $9,261,043 figure. Appellee is accordingly placed in this dilemma: if the order and report be viewed as one, then this suit is tardy since appellee's attack lay against the order authorizing it to issue stock and operate the road; or, if the report of October 9, 1929, stands on its own feet as being an erroneous interpretation of a valid order, then this suit is premature since no order has been entered which requires appellee to accept the Commission's interpretation.

No basis for the relief granted by the court below was furnished by its general equity powers. It was alleged that the Commission's findings as to the amount of appellee's investment in road and equipment would be admissible evidence in proceedings to fix rates and in computation of recapturable earnings under Section 15(a), and in ascertainment of depreciation. These contentions will be dealt with on the merits, but it is sufficient answer for this purpose that the Commission has

not attempted to so use that amount in this proceeding. The contention is disposed of by this Court's decision in *United States* v. *Los Angeles & Salt Lake Railroad Company*, 273 U. S. 299. There the Court held that a final valuation order of the Commission, entered pursuant to Section 19a, was not reviewable by the courts. The Court said in dealing with a similar contention (pp. 314–315):

> No basis is laid for relief under the general equity powers. The investigation was undertaken in aid of the legislative purpose of regulation. In conducting the investigation, and in making the report, the Commission performed a service specifically delegated and prescribed by Congress. Its conclusions, if erroneous in law, may be disregarded. But neither its utterances, nor its processes of reasoning, as distinguished from its acts, are a subject for injunction.

It is finally contended that the failure of appellee to keep its accounts in the manner specified in the Commission's report will subject it to penalties under Section 20 (6) of the Interstate Commerce Act. This contention assumes that the Commission has ordered and not invited compliance with the report. And, further, it fails to provide a basis for the lower court's jurisdiction since the penalties are imposed not by virtue of the Commission's action but by virtue of the statute. *Lehigh Valley Railroad Co.* v. *United States*, 243 U. S. 413, 414.

II

THE COURTS HAVE NO JURISDICTION TO REWRITE AN ORDER OF THE COMMISSION AFTER THE AUTHORITY GRANTED BY THE ORDER HAS BEEN EXERCISED

Even if the report of the Commission were construed as an order, it would not be the kind of order that is judicially reviewable under the Urgent Deficiencies Act of October 22, 1913.

The report considered the interpretations which appellee and the lower court desired to place on the Commission's language in the December 21, 1926, order and stated that the amount intended by it to be shown on appellee's books under "Investment in Road and Equipment" was one not in excess of $9,261,043.87. Appellee, after acting under the authorization by issuing stock and acquiring the road, seeks to nullify the effect of that condition by this suit, and the lower court, by determining that the amount required to be set up was the present market value of the road, emasculated the condition attached by the Commission to its authorization.

Appellee must be charged with the knowledge of the purpose of this condition. The Commission's report on the application of the committee for a certificate of public convenience and necessity, recited that the applicants had indicated their willingness to submit to such reasonable restriction in the statements of their accounts as the Commission might prescribe. (R. 317.) That restriction

was contained in the 1926 order, namely, that the preferred stock be stated at par and the common at "not in excess of the amount received therefor." Subsequently, appellee in notifying the Commission of its issuance of stock, placed on the common stock the value of $4,080,699.80. (R. 337.) That value, which is here contested, must have been specified because of appellee's understanding that the Commission's order so required. The proviso is not ambiguous. It stated that the common stock should be stated at not in excess of the *amount* received therefor. The only amount involved in the Plan of Reorganization was the amount Coast Line should pay in order that it might secure the common stock. Further, if the condition be construed to mean the value of the road acquired, then it would impose no real limitation on the authority to issue stock. But the insertion of the proviso seems to make it certain. It follows, therefore, that appellee should have contested the order by which it was authorized to issue the stock. Such an order, though permissive in character, is subject to attack under the decisions of this Court. *Chicago Junction Case,* 264 U. S. 258, 263; *Venner Company* v. *Michigan Central Railroad,* 271 U. S. 127, 131.

We do not understand the lower court's decision to hold, nor do we concede that it would have been unlawful for the Commission to have specifically provided in this case that appellee's investment in road and equipment should be stated at $9,261,043.87.

Under Section 20a (3) of the Interstate Commerce Act, the Commission is empowered to grant applications or permission to issue stock upon such terms and conditions as it "may deem necessary or appropriate in the premises." No restriction could be more pertinent to such a grant of authority than a provision as to the amount at which the stock should be set up on the books of the carrier. Power to insert such a condition is also found in the sections of the Act dealing with accounting entries. Section 20(1) of the Act empowers the Commission to require annual reports from carriers showing, *inter alia,* the "cost and value" of the carrier's property. It provides further that the Commission shall have power to require the keeping of uniform accounts by all carriers. Subparagraph (5) of that Section provides that the Commission in its discretion may prescribe the forms of "any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act." In *Kansas City Southern Railway* v. *United States,* 231 U. S. 423, the Court held that accounting classifications of the Commission relating to entries for construction made off the carrier's line and resulting in abandonment of a part of its property were not so in variance with the fundamental principles of accounting as to manifest an abuse of power, even though the complaining carrier was thereby allowed to enter in its capital accounts only $200,000 of an outlay of approximately $600,000 in improvements off its line. *A fortiori,*

the present requirement is not unlawful in prescribing that appellee shall state the cost to it of acquiring the road rather than the value of the property acquired.

If the present question, then, be one of interpretation of an order, it seems manifest that the Commission rather than the court is charged with its interpretation. But the lower Court in its decision has in effect informed the Commission what it is entitled to have shown on appellee's books and has denied the Commission's power to determine what the accounts prescribed by it should contain. In *Kansas City Southern Railway,* v. *United States,* 231 U. S. 423, *supra,* in rejecting a contention that Section 20 unconstitutionally delegated legislative power to the Commission, the Court said (pp. 443, 456):

> And since, as just shown, uniformity in accounting is dependent upon the adoption and enforcement of precise classification, the authority to define the terms of the classification necessarily follows. It amounts, after all, to no more than laying down the general rules of action under which the Commission shall proceed, and leaving it to the Commission to apply those rules to particular situations and circumstances by the establishment and enforcement of administrative regulations.
>
> * * * * *
>
> But, did we agree with appellant that the abandonments ought to be charged to surplus or to profit and loss, rather than to op-

> erating expenses, we still should not deem this a sufficient ground to declare that the Commission had abused its power. So long as it acts fairly and reasonably within the grant of power constitutionally conferred by Congress, its orders are not open to judicial review.

We submit that the interpretation of its order was a proper administrative function of the Commission. One of the chief administrative reasons which must have influenced the Commission in approving the Plan of Reorganization was that this Plan afforded an opportunity to eliminate watered values and over-capitalization in the road's financial structure. The effect of the lower court's rewriting the condition of the Commission's order (and in so doing thereby passing on a wholly different administrative question than that before the Commission), is to rest appellee's authorization to issue stock and acquire control of the road upon the judgment of the court and not the administrative findings of the Commission. See *Procter & Gamble* v. *United States*, 225 U. S. 282; *Hooker* v. *Knapp*, 225 U. S. 302.

III

THE REPORT OF THE COMMISSION WAS A CORRECT AND LAWFUL INTERPRETATION OF THE PRIOR ORDER

Appellee alleged in its bill that the report of the Commission was unlawful since it departed from the law of the case fixed by the court's first decision; that is, that the merits can not be considered by this Court since no appeal was taken from the

first decision of the District Court. (R. 484.) The sole question before the court on the first hearing was whether the Commission should have allowed appellee a hearing in support of its interpretation of the condition and accounting rules. The view taken by the court itself answers this contention. In the present suit it considered the merits of the case *de novo*, and stated regarding the first suit (R. 500):

> At that time an order of the Interstate Commerce Commission [April 9, 1928], made upon a supplemental application of the Coast Company for interpretation of a former order, dated December 21st, 1926, touching the accounts of the company, was set aside because granted without a hearing.

The only question which could have been raised before this Court would have been one of an administrative nature, that is, whether a hearing should have been allowed. The decisions cited by appellee lend no support to its contention. In *Lucas* v. *Alexander*, 279 U. S. 573, and *Federal Trade Commission* v. *Pacific Paper Ass'n*, 273 U. S. 52, this Court held that a respondent in *certiorari* could not obtain a review by the Court of questions not raised by petitioner's application for review and upon which respondent had not filed petition for review.

The decision below did not hold that the Commission is without authority to prescribe that property acquired by a carrier shall be entered

upon its books at cost. The fallacy of the decision would be more apparent had the court stated, as it indirectly held, that the cost to a carrier of acquiring a road is the value of the road acquired. The court reached that erroneous result by misinterpretation of the Commission's rules and its order applicable to appellee's capital stock entries which, *per contra,* are reflected in the asset statement under "Investment in Road and Equipment."

The applicable phrases of the Commission's accounting rules are as follows (*supra,* pp. 9–10):

> The charges to the accounts of this classification [Investment in Road and Equipment] shall be based upon the cost of the property acquired. When the consideration given for the purchase or the improvement of property, the cost of which is chargeable to the accounts of this classification is other than money the money value of the consideration at the time of the transaction shall be charged to these accounts, and the actual consideration shall be described in the record in sufficient detail to identify it.
>
> * * * * *
>
> Where the consideration given for the property purchased is other than cash, such consideration shall be valued on a current cash basis. (Primary Account 41.)
>
> * * * * *
>
> *Capital Stock.*—When such certificates or receipts (of the accounting company) have

> no par value they shall be included in this account at the amount corresponding to the cash received, or the cash equivalent if the consideration is other than cash. * * *

The proviso of the Commission's order of December 21, 1926 states:

> * * * the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor.

At the first hearing before the District Court, appellee contended that under these provisions the amount to be set up under "Investment in Road and Equipment" was the Commission's rate valuation of AB&A property as of 1914 (75 I. C. C. 645), brought to date. The lower court, although basing its decision upon the denial of hearing, stated that the proper entry was the present market value of the road. This ruling would evidently require the Commission separately to appraise each item of the carrier's equipment as to marketability. Appellee, after the first decision, introduced before the Commission a revised balance sheet based on the Commission's old valuation. (R. 207, 161.) The Commission's statement that this was not "pertinent or material evidence" led the lower court to set aside the report, although it adopted its previous view as to the proper entries to be made.

The purpose of the Commission's accounting rule No. 41 (*supra*, p. 9) is to record the historical fact of the amount invested by the carrier in an acquired road, and the lower court so found. (R.

502.) The court said, however, that a necessary exception was found where the purchasing company does not pay cash but issues stock, and that here the cash value of appellee's stock was to be measured by the value of the road acquired under the reorganization. If appellee had paid $9,261,043.87 for the road, the lower court admittedly would have found that the proper entry was that figure, and, *per contra,* not the value of the road.

In determining the cash value of the preferred stock the court and appellee are willing to ascribe to it its par value, $5,180,344. The mere fortuity, therefore, that the common stock issued was without par value, or issue price, gives rise to the assertion that its money value is the value of the road less the par value of the preferred stock—and this despite the fact that the road was acquired by virtue of a Plan calling for the issue of both classes of stock.

The Plan of Reorganization contemplated the vesting of title in appellee of an *unencumbered* road. The vesting of title was but an incident of the Plan; its substance lay in the retirement of the debts of the old company. Pursuant to the Plan, the preferred stock was issued to the bondholders of AB&A, and, to insure their acceptance of unsecured obligations, this stock was guaranteed by Coast Line. There were debts having priority over the bonds. These Coast Line agreed to discharge in consideration for the issuance to it of

150,000 shares of common stock. These prior charges were not indeterminate. A schedule was attached to Coast Line's agreement defining the scope of its undertaking with an expansive provision to include, if necessary, principal and interest on refunding bonds held as collateral for such charges. (R. 90, 84.) The amount paid or assumed by Coast Line came to $4,080,699.80.

Deferring the question as to the propriety of valuing the guaranty (see pp. 40–43, *infra*) the Commission properly ascribed $4,080,699.80 as the cash value of the 150,000 shares of common stock without par value. While appellee did not receive this amount directly, the Commission correctly viewed the transaction as amounting to that. Had appellee issued its common stock directly to Coast Line and received this sum necessary to retire the prior charges, it is clear from the view of the court below that such payment would have fixed the value of the common stock. It is difficult to see why the payment of $4,080,699.80 to appellee's nominees, the creditors of AB&A (for that was the effect of the Plan), would not equally fix the cash value of the common stock at that figure. The parties to the Plan of Reorganization themselves regarded the transaction involving the issuance of appellee's common stock as amounting, in substance, to a cash transaction. The Plan stated (R. 94):

> The Railroad Company [Coast Line] shall be entitled to the entire issue of 150,000 shares

> without par value of common stock of the New Company in exchange for the cash which the Railroad Company shall provide.

A witness supporting the Plan before the Commission stated that the common stock was to be sold to Coast Line for approximately $3,500,000, the amount necessary to lift the receivership. (R. 168, 169, 174.) In its certificate of notification to the Commission of securities sold, pursuant to Section 20a of the Interstate Commerce Act, appellee stated that on January 4, 1927, it had sold its 150,000 shares of common stock to Coast Line, and assigned as its tentative value, $4,080,699.80, the amount paid by Coast Line to AB&A creditors. (R. 337.)

Apparently the court below was impressed by the fact that appellee received nothing under the Plan but a deed to the railroad property. It failed to consider the purpose and effect of the Plan, which was to discharge the debts of the old company in order that the new company should have the property free from liens. The District Court was insistent that the valuation of the common stock urged by the Commission involved a confusion of the identities of appellee and Coast Line; a failure to distinguish Coast Line's expenditure and appellee's investment. There is no occasion to confuse the identities of the corporations. It is conceded that in the ordinary case the stockholders' investment in stock and the company's investment in road have no necessary relation, but this is not

such a case. Here, as a part of one single transaction, Coast Line credited on its books $4,080,697.80, which it had paid out in order to acquire appellee's stock, and yet appellee would charge itself with a liability on the same stock of over $19,000,000. The court, on the other hand, would fix the charge at the present market value of the road less the preferred stock, merely for the reason that Coast Line did not pay that sum over to it but rather retired a debt which would otherwise have encumbered the property. This view as to the relation of the investment of Coast Line with that of appellee was taken by the chairman of the bondholder's committee, who testified that the investment of the new company under the Plan was represented by the par value of the preferred stock, plus the cash to be supplied by Coast Line. (R. 175.)

The appellants do not admit that the proper approach to this problem is through valuation of appellee's road. Yet even on the view taken by the lower court there was ample evidence to sustain the Commission's finding on that basis. The entire record of the proceedings before the Commission is available in determining the correctness of the Commission's report of October 9, 1929, and that record conclusively establishes that there was no disparity between the market value of the road and the amount determined by the Commission as representing appellee's investment.

At the hearing on February 4, 1929, the only evidence of value offered by appellee was an exhibit prepared from the Commission's prior valuation of the road, showing "Investment in Road and Equipment" of $24,481,893. (R. 161.) The Commission considered this valuation and stated that it was not "pertinent or material evidence in the determination of appellee's investment." The Commission determined that as between the appellee's figure and $9,261,043, even on the lower court's theory, the latter was the only fair index of the worth of the road. The road was operating with yearly deficits, there was no prospect of successful operation as an independent carrier due to its lack of traffic, and the bondholders had even considered scrapping the road (*supra*, pp. 3–4).

The chairman of one of the bondholder's committees testified that under the Plan the bondholders of A. B. & A. were accepting about 50% of the par value of their investment, without provision for accrued interest. (R. 168.) He stated that the earnings of the new company would be entirely disproportionate to the Commission's rate valuation of the properties, and that placing any par value on the common stock of the new company, or the property represented by it, would be meaningless. (R. 169.) In the Commission's first report it was stated that the stockholders of A. B. & A. had submitted the 1914 valuation of the road as showing that it was inequitable to permit Coast Line to acquire control

of the new company at the price proposed under the Plan and without provision for them. (R. 312, 314.) The Commission overruled this objection to the Plan and stated that its valuation under Section 19 (a) had no necessary relation to the exchange or cash value of the property, and that its valuation report (75 I. C. C. 645), indicated that the sum then fixed by it on which the carrier was entitled to earn a fair return had no relation to the market value of the road. (R. 314.) Yet, appellee, having acquired the property without provision for A. B. &. A. stockholders and on the theory that the rate valuation of A. B. & A. had no relation to the road's market value, attempted to employ the same valuation as its statement of its investment in road and equipment. And the court below, while it rejected appellee's contention that $24,000,000 was the present value of the road acquired, held that the Commission erred in not considering that sum as material evidence of appellee's investment. (R. 502.)

Even on the court's view that the value of the road should be determined, Section 19a (i) of the Act did not require the Commission to accept its prior valuation as "prima facie evidence of the value of the property." The value of the road for rate-making purposes was not prima facie evidence of its market value. The Commission in its valuation proceeding indicated that it was fixing only a sum on which the carrier was entitled to earn a fair return, and that even in 1923 there was a wide dis-

parity between the sum fixed and the market value of the road (75 I. C. C. 669, 672). The lower court in its first opinion did not intimate that the proper procedure for the Commission to follow would be to institute formal valuation proceedings under that Section; it inferred that informal valuation of the present cash worth of the property would be proper, thereby recognizing the distinction between fixing a rate and market value. Further, the facts in evidence before the Commission in the record of the entire proceedings destroyed any prima facie effect which conceivably could be attached to its prior valuation. Therefore, the lower court on its own view erred in holding that such valuation was material or pertinent evidence. *A fortiori*, it erred on the view for which the Government contends.

The decision of the District Court is not rested on the ground that Coast Line assumed guarantees on the preferred stock to which a value should be assigned. No mention is made of that fact in its opinion, and its first opinion mentions the fact only in support of its view that the road should be valued. Even if the propriety of the Commission's action in this regard can be urged before this Court, it is submitted that the reasons given by the Commission in its report of October 9, 1929, justify the failure to assign a value to the guaranty. It was there said (R. 491, 493–494):

> As stated in the original and supplemental reports, dividends on the preferred stock

were guaranteed by the Atlantic Coast Line at the rate of 5 per cent per annum, payable in semi-annual installments, such dividends to be cumulative and to accrue from January 1, 1928. The stock is redeemable at the option of the issuing company in whole, but not in part, on any semi-annual dividend date after January 1, 1935, at 103 and accrued dividends. Upon the winding up or dissolution of the corporation, the holders of the preferred stock are to receive par value of the stock and accrued dividends before recognition of common stock. The common stock is to have exclusive voting power except in case of default in dividend payment on the preferred stock for two successive dividend dates; in such case the preferred stock is to have exclusive voting power so long as the default shall continue. The correctness of this statement is not questioned. It thus appears that by its guaranty of dividends on the preferred stock the Atlantic Coast Line secured itself against default and insured its retention of control of the New Company through the voting rights of the no-par stock which it received. Considered by itself, and assuming that it must be regularly and permanently relied upon, a guaranty of dividends at 5 per cent might be computed at the par value of the stock upon which the dividend is paid. In this case, however, the preferred stock is subject to redemption after a short period of years, and by the exercise of this privilege the liability under the

guaranty can be terminated by the purchase of the stock at a premium of 3 per cent. Meanwhile the preferred stockholders have no voice in the corporation; and upon liquidation, which is also within control of the Atlantic Coast Line, they have preference in the distribution of assets to the extent of par value of their stock. The benefits of the guaranty and of interest in the assets of the New Company through ownership of its preferred stock can not be realized concurrently. Under these circumstances, it seems improper to assign a value to the guaranty in addition to the par value of the stock guaranteed.

* * * * *

It is true that the court did not accept the amount proposed by our bureau of accounts as a sufficient reflection of "fair cash value" either of the properties acquired or of the securities issued; but upon examination of the decision to determine the basis of this view, it is found in the assumption that the guaranty of dividend given by the Atlantic Coast Line was not given proper consideration by us. Responsive to this view, we have carefully reconsidered the record in its bearing upon the question. The function and value of the guaranty are discussed in preceding pages. The correctness of the analysis has not been questioned by the applicant. The value of the guaranty is re-

> flected in the value assigned to the preferred stock, which, as repeatedly stated, is reckoned at par. Without the guaranty, no value could have been assigned to it; and, as already indicated, an additional assignment of value would be an unwarranted duplication.

Other reasons assigned by the Court to support its decision are that the sum fixed may be employed for fixing rates and for determining recapturable profits. Rates fixed by the Commission under Section 15a (2) are based upon the "aggregate value of the railway property" as determined by the Commission in formal proceedings under Section 19a. Recapturable profits are determined under Section 15a (5) on the basis of whether the carrier is earning more than a fair return on that value. It is submitted that the entry here in question, the cost to appellee of acquiring the road, has no relation to such matters. If it be true that the figure here fixed will be admissable evidence in a future valuation proceeding, this furnishes no argument against the Commission's finding. Wholly apart from the determination here made, the Commission by Section 19a is required to investigate the facts as to this reorganization, including the history of appellee's organization and "any increases or decreases of stocks, bonds, or other securities."

It is also urged that the sum fixed by the Commission would allow appellee inadequate allowance for depreciation. The only depreciation which appellee is entitled to show for the purpose of the account here in question is that based on the cost to it of the road acquired. If the Commission's figure properly represents that investment, then for the purpose of this account depreciation must be based on that amount. In other words, the contention is based on the assumption that the Commission's finding was an incorrect statement of that investment. The fear that the Commission might use the depreciation so fixed as the depreciation allowable upon a future rate valuation is also largely fanciful. Even if the Commission chose to do so, by the decision of this Court in *United Railways* v. *West,* 280 U. S. 234, it could not limit annual depreciation allowances to cost.

The final contention is that the finding of the Commission is inconsistent with a previous ruling it has made. (R. 301.) In *Virginian Railway* v. *United States,* 272 U. S. 658, this Court said (p. 665):

> This Court has no concern with the correctness of the Commission's reasoning, with the soundness of its conclusions, or with the alleged inconsistency with findings made in other proceedings before it.

CONCLUSION

It is respectfully submitted that the decree in the District Court should be reversed with directions to dismiss the petition either on the merits or for want of jurisdiction.

THOMAS D. THACHER,
Solicitor General.
JOHN LORD O'BRIEN,
The Assistant to the Attorney General.
WILLIAM G. DAVIS,
ELMER B. COLLINS,
Special Assistants to the Attorney General.
ERWIN N. GRISWOLD,
Attorney.

DANIEL W. KNOWLTON, *Chief Counsel,*
EDWARD M. REIDY, *Solicitor,*
Interstate Commerce Commission.

JANUARY, 1931.

APPENDIX

The Interstate Commerce Act provides in part:

Section 1. (18) After ninety days after this paragraph takes effect no carrier by railroad subject to this Act shall undertake the extension of its line of railroad, or the construction of a new line of railroad, or shall acquire or operate any line of railroad, or extension thereof, or shall engage in transportation under this Act over or by means of such additional or extended line of railroad, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity require or will require the construction, or operation, or construction and operation, of such additional or extended line of railroad, and no carrier by railroad subject to this Act shall abandon all or any portion of a line of railroad, or the operation thereof, unless and until there shall first have been obtained from the Commission a certificate that the present or future public convenience and necessity permit of such abandonment.

(20) The Commission shall have power to issue such certificate as prayed for, or to refuse to issue it, or to issue it for a portion or portions of a line of railroad, or extension thereof, described in the application, or for the partial exercise only of such right or privilege, and may attach to the issuance of the certificate such terms and conditions as in its judgment the public convenience and

necessity may require. From and after issuance of such certificate, and not before, the carrier by railroad may, without securing approval other than such certificate, comply with the terms and conditions contained in or attached to the issuance of such certificate and proceed with the construction, operation, or abandonment covered thereby. * * *

(C. 91, 41 Stat. 477, 478; U. S. C., Title 49, secs. 1 (18) (20).)

Section 19a. (i) If notice of protest is filed the commission shall fix a time for hearing the same, and shall proceed as promptly as may be to hear and consider any matter relative and material thereto which may be presented in support of any such protest so filed as aforesaid. If after hearing any protest of such tentative valuation under the provisions of this Act the commission shall be of the opinion that its valuation should not become final, it shall make such changes as may be necessary, and shall issue an order making such corrected tentative valuation final as of the date thereof. All final valuations by the commission and the classification thereof shall be published and shall be prima facie evidence of the value of the property in all proceedings under the Act to regulate commerce as of the date of the fixing thereof, and in all judicial proceedings for the enforcement of the Act approved February fourth, eighteen hundred and eighty-seven, commonly known as "the Act to regulate commerce," and the various Acts amendatory thereof, and in all judicial proceedings brought to enjoin, set aside, annul, or suspend, in whole or in part, any order of the Interstate Commerce Com-

mission. (C. 92, 37 Stat. 703; c. 91, 41 Stat. 493; U. S. C., Title 49, sec. 19a(i).)

Section 20. (1) That the Commission is hereby authorized to require annual reports from all common carriers subject to the provisions of this Act, and from the owners of all railroads engaged in interstate commerce as defined in this Act, to prescribe the manner in which such reports shall be made, and to require from such carriers specific answers to all questions upon which the Commission may need information. Such annual reports shall show in detail the amount of capital stock issued, the amounts paid therefor, and the manner of payment for the same; the dividends paid, the surplus fund, if any, and the number of stockholders; the funded and floating debts and the interest paid thereon; the cost and value of the carrier's property, franchises, and equipments; the number of employees and the salaries paid each class; the accidents to passengers, employees, and other persons, and the causes thereof; the amounts expended for improvements each year, how expended, and the character of such improvements; the earnings and receipts from each branch of business and from all sources; the operating and other expenses; the balances of profit and loss; and a complete exhibit of the financial operations of the carrier each year, including an annual balance sheet. Such reports shall also contain such information in relation to rates or regulations concerning fares or freights, or agreements, arrangements, or contracts affecting the same as the Commission may require; and the Commission may, in its discretion, for the purpose of enabling it the better to carry out the purposes of this Act, prescribe a

period of time within which all common carriers subject to the provisions of this Act shall have, as near as may be, a uniform system of accounts, and the manner in which such accounts shall be kept. (C. 104, 24 Stat. 386; c. 3591, 34 Stat. 593; U. S. C., Title 49, sec. 20.)

(5) The Commission may, in its discretion, prescribe the forms of any and all accounts, records, and memoranda to be kept by carriers subject to the provisions of this Act, including the accounts, records, and memoranda of the movement of traffic, as well as of the receipts and expenditures of moneys. * * * The commission shall at all times have access to all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by carriers subject to this Act, and the provisions of this section respecting the preservation and destruction of books, papers, and documents shall apply thereto, and it shall be unlawful for such carriers to keep any other accounts, records, or memoranda than those prescribed or approved by the Commission, and it may employ special agents or examiners, who shall have authority under the order of the Commission to inspect and examine any and all accounts, records, and memoranda, including all documents, papers, and correspondence now or hereafter existing, and kept or required to be kept by such carriers. * * *.

(6) In case of failure or refusal on the part of any such carrier, receiver, or trustee to keep such accounts, records, and memoranda on the books and in the manner prescribed by the Commission, or to submit such accounts, records, and memoranda as

are kept to the inspection of the Commission or any of its authorized agents or examiners, such carrier, receiver, or trustee shall forfeit to the United States the sum of five hundred dollars for each such offense and for each and every day of the continuance of such offense, such forfeitures to be recoverable in the same manner as other forfeitures provided for in this Act. (C. 3591, 34 Stat. 594; c. 91, 41 Stat. 493, 494; U. S. C., Title 49, secs. 1 (5), (6).)

Section 20a. (2) From and after one hundred and twenty days after this section takes effect it shall be unlawful for any carrier to issue any share of capital stock or any bond or other evidence of interest in or indebtedness of the carrier (hereinafter in this section collectively termed "securities") or to assume any obligation or liability as lessor, lessee, guarantor, indorser, surety, or otherwise, in respect of the securities of any other person, natural or artificial, even though permitted by the authority creating the carrier corporation, unless and until, and then only to the extent that, upon application by the carrier, and after investigation by the Commission of the purposes and uses of the proposed issue and the proceeds thereof, or of the proposed assumption of obligation or liability in respect of the securities of any other person, natural or artificial, the Commission by order authorizes such issue or assumption. The Commission shall make such order only if it finds that such issue or assumption: (a) is for some lawful object within its corporate purposes, and compatible with the public interest, which is necessary or appropriate for or consistent with the proper performance by the carrier of service to the public as a common carrier, and

which will not impair its ability to perform that service, and (b) is reasonably necessary and appropriate for such purpose.

(3) The Commission shall have power by its order to grant or deny the application as made, or to grant it in part and deny it in part, or to grant it with such modifications and upon such terms and conditions as the Commission may deem necessary or appropriate in the premises, and may from time to time, for good cause shown, make such supplemental orders in the premises as it may deem necessary or appropriate, and may by any such supplemental order modify the provisions of any previous order as to the particular purposes, uses, and extent to which, or the conditions under which, any securities so theretofore authorized or the proceeds thereof may be applied, subject always to the requirements of the foregoing paragraph (2). (C. 91, 41 Stat. 494, 495; U. S. C., Title 49, Sec. 20a (2), (3).)

U. S. GOVERNMENT PRINTING OFFICE 1931

FILE COPY

FILED
MAY 21 1930
CHARLES ELMORE CROPLEY
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1929

NO. 88

UNITED STATES OF AMERICA *and* INTERSTATE COMMERCE COMMISSION,
Appellants,
vs.
ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY,
Appellee.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

COUNTER SHOWING AGAINST THE JURISDICTION OF THE COURT IN THIS CAUSE, WITH MOTION TO DISMISS BECAUSE OF THE WANT OF A SUBSTANTIAL FEDERAL QUESTION, AND MOTION TO AFFIRM

F. B. GRIER,
CARL H. DAVIS,
JOHN A. HYNDS,
ROBERT C. ALSTON,
Counsel for Atlanta, Birmingham & Coast Railroad Company.

In the Supreme Court of the United States

OCTOBER TERM, 1929

NO. 837

UNITED STATES OF AMERICA *and* INTERSTATE COMMERCE COMMISSION, *Appellants*, vs. ATLANTA, BIRMINGHAM & COAST RAILROAD COMPANY, *Appellee*.	ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF GEORGIA

COUNTER SHOWING AGAINST THE JURISDICTION OF THE COURT IN THIS CAUSE, WITH MOTION TO DISMISS BECAUSE OF THE WANT OF A SUBSTANTIAL FEDERAL QUESTION, AND MOTION TO AFFIRM

In compliance with Rule 12, paragraph 2, of this Court, appellee makes counter showing against the jurisdiction asserted by appellants in this case:

I

Title 28, Section 47, of the United States Code provides that:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction in such case."

Note: The record in this case has not been printed. It is, therefore, impracticable to refer to the pages.

The cases referred to are those brought to set aside orders of the Interstate Commerce Commission. A like appeal is allowed by this section from final decrees in such proceedings.

Under Section 266 of the Judicial Code (Title 28, Sec. 380) an appeal is allowed direct to the Supreme Court from orders granting or denying, after notice and hearing, an interlocutory injunction in cases dealing with the unconstitutionality of certain state statutes. A like appeal is allowed from final decrees. (Title 28, Sec. 345.)

Section 237 of the Judicial Code gives to the Supreme Court jurisdiction over direct appeal from

> "a final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of the United States, and the decision is against its validity", etc.

The right of appeal is not more positively fixed for one of these classes than for the other.

Rule 12 applies to each class.

Jurisdiction is denied in this case for that there is a lack of a substantial federal question.

We do not understand that the Court is any more without the power to inquire as to the presence or absence of a substantial federal question in one class of these cases than in the other. A great many appeals are disposed of by the Court for that there is a want of a substantial federal question.

See Sambor vs. Philadelphia Rapid Transit Co.,
278 U. S. 572, and cases cited.

Rule 12 is not a part of the granting of an appeal; it is a part of the machinery for the disposition of the appeal.

II

THE APPEAL PRESENTS NO SUBSTANTIAL FEDERAL QUESTION

The case has been twice before the United States District Court for the Northern District of Georgia (A. B. & C. Railroad Co. vs. U. S., 28 Fed. 2d, 885, decided Oct. 26, 1928, and 37 Fed. 2d, 401, decided Jan. 18, 1930). The first case was an original bill to restrain the enforcement of an order of the Interstate Commerce Commission requiring appellee to enter upon its books the value of its investment in road and equipment on the basis of $9,260,000, while appellee contended that the value should be set up on the basis of $30,000,000. Appellee's action was rejected by the Director of the Bureau of Accounts of the Commission on August 3, 1927, and Appellee was directed to reduce the initial charges to Account 701 by $22,390,985.21. Account 701 is investment in road and equipment. Appellee filed with the Commission its supplemental petition protesting against the action of said Director of the Bureau of Accounts, praying that it be granted a hearing. The Commission denied the prayers of said petition on April 9, 1928. The effect of these proceedings was to require the Account 701, investment in road and equipment, to be entered upon appellee's books at $6,741,486.40, whereas appellee claimed this entry should have been $29,471,859.00.

The basis contended for by appellee was the value which the Commission, acting under Section 19a of the Act to Regu-

late Commerce, had found for this property under previous ownership in Valuation Docket No. 1 (75 I. C. C. 645), conformed to net changes in additions and betterments.

III

SHORT STATEMENT OF THE HISTORY OF THE PROCEEDINGS

The property involved and previously owned by Atlanta, Birmingham & Atlantic Railway Company was sold on the 22nd day of June, 1926, under foreclosure proceedings had in the United States District Court for the Northern District of Georgia. On the 23rd day of February, 1926, an agreement was made between bondholders' committees and Atlantic Coast Line Railroad Company, which was subsequently approved by the Court, which contemplated that the property would be sold and bought by a reorganization committee and that the reorganization committee would sell it to a corporation to be formed, which corporation is the appellee, and that the appellee would pay the reorganization committee for the property by issuing $5,180,344.07 of preferred stock—this stock having certain guaranties by the Atlantic Coast Line Railroad Company—and 150,000 shares of no par value common stock. The committee was to exchange the preferred stock with the bondholders and the common stock was to be transferred by the committee to the Atlantic Coast Line Railroad Company in consideration of the payment by that company of certain debts of the Atlanta, Birmingham & Atlantic Railway Company, specified in the agreements; those debts having priority; and in consideration of the guaranty of the dividends and redemption value of the preferred stock of Atlanta, Birmingham & Coast Railroad Company. The prop-

erty was sold and bought in by the committee, the sale was confirmed, and the shares of stock were issued to the committee and were used as contemplated in the agreement, as above set out.

Application was made to the Interstate Commission on behalf of appellee for a certificate of public convenience and necessity. This was made by the reorganization committee. It was dated the 8th of April, 1926, prior to appellee's incorporation. Hearings were had and an order entered on the 26th of October, 1926, finding the present and future public convenience and necessity require the acquisition and operation in Interstate Commerce by the reorganization committee, and by the Atlanta, Birmingham & Coast Railroad Company, of the railroad of the Atlanta, Birmingham & Atlantic Railway Company. In the meantime, the property was sold on June 22, 1926, conditioned upon the issuance of the orders authorizing the transaction by both the Atlanta, Birmingham & Coast Railroad Company and the Atlantic Coast Line Railroad Company. This sale was confirmed on June 23, 1926, subject to and conditioned upon the issuance by the Interstate Commission of appropriate orders allowing and approving the transaction.

On the 26th of October, 1926, the Commission issued its order certifying that:

> "The present and future public convenience and necessity require the acquisition and operation in interstate commerce by the reorganization committee, named and described in said report, and by the Atlanta, Birmingham & Coast Railroad Company, a corporation to be organized for the purpose of engaging in transportation subject to the Interstate Commerce Act, of the rail-

road of the Atlanta, Birmingham & Atlantic Railway Company, now operated by the receiver of said company, as described in said report and in the application in this proceeding." (117 I. C. C. 181.)

The action on the prayer that the new company (this appellee) be allowed to issue securities was deferred until charter should be granted. The charter of appellee was granted on November 22, 1926, and on the 25th of November it joined in the original petition filed before the Commission. In the meanwhile, and on the 16th of November, 1926, the special master and others had conveyed the property to George E. Roosevelt and J. A. Fowler, Jr., as representatives of the reorganization committee, and the court did on that day enter its unconditional confirmation of the sale.

On the 21st of December, 1926, the Commission issued its order allowing appellee to issue the aforementioned shares of preferred and common stock, with this proviso:

> "Provided, however, that authority to issue said stock is granted upon the express condition that, for the purposes of the accounting as provided in the classification of investment in road and equipment in the text of Account 41, 'Cost of road purchased', the cash value of the preferred stock issued must, in stating the transactions in the accounts, be reckoned on a basis not in excess of the par value and that the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor." (117 I. C. C. 439, 443.)

Appellee on the first day of January, 1927, received conveyance of the property from the representatives of the bondholders' committee, paying therefor the consideration specified in the original agreement, to-wit, $5,180,344.07, par

value of its preferred stock, and 150,000 shares of its no par value common stock; the Coast Line Company guaranteeing the preferred stock and agreeing to pay the aforementioned items of prior claims. Appellee then proceeded to set up its books by charging Account 701, investment in road and equipment, $29,471,859.00, which was the value fixed on the property by the Commission, adjusted as hereinbefore set out. Thereupon, the Commission took the action hereinbefore described and rejected appellee's statement of its account.

Appellee then filed its bill in the United States District Court for the Northern District of Georgia seeking to set aside the order of the Commission, and the court rendered an opinion and final decree (28 Fed. 2d, 885) holding in part as follows:

> "The words of the order of December 21, 1926, were acted on by the parties and should have their fair operation. We think that they require that the valuation of the stock and the off-setting entries as to the investment in road and equipment should be fixed on a basis of a fair cash value of the property acquired by the Coast Company in exchange for its stock as of the date of its acquisition by it." (Page 887.)

The Court then set aside the aforementioned order of the Commission rejecting appellee's statement of its accounts, and directed appellee's supplemental petition above referred to "to stand for a hearing before the Commission in due course". Neither the Commission nor the United States took appeal from that decree.

There was a further hearing before the Commission and on October 9, 1929, a decision was rendered by the Commis-

sion. The Commission adhered to its original order and figures, saying in part:

> "Counsel for the new company also contend that paragraph (1) of Section 19a requires that the value found under that section be treated as prima facie evidence of the value to be included in the investment accounts of the new company; *but we do not regard that value as pertinent or material in the determination of investment, as that term is used in our accounting regulations.* Upon consideration of the record as supplemented we find and conclude that the amount to be included in the balance sheet of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. The company will be expected to adjust its accounts in accordance with this finding within sixty days from the service of this report." (Italics added.)

It will thus be seen that the Court construed the orders of the Commission, upon which the parties at interest had acted, to mean that the disputed entry must be made on the basis of the value of the property acquired by Atlanta, Birmingham & Coast Railroad Company in consideration of its shares of common and preferred stock, from which determination the Commission took no appeal. It will then be seen that the Commission determined that this valuation was "neither pertinent nor material evidence in the determination of investment", and that the action of the Commission was thus in direct conflict with the law of the case as that had been fixed by the Court in its first decree.

Appellee thereupon filed supplemental pleadings setting up the facts which had occurred since the original decree above referred to, and hearing was had thereon, the Court

being presided over by three Judges. An opinion was rendered, and the Court, in its opinion and decree on this supplemental pleading, held that:

> "A fair estimate of the value of the property on January 1, 1927, would require consideration not only of the cash dealings at that time respecting it and of the conditions then surrounding its use, but also of the original cost or value of it. Because of the refusal to consider the latter evidence, we think the order unlawfully arrived at. The Commission's report makes but scant reference to value, and that reference is only by way of make-weight. It goes rather to the idea that the case is controlled by the cash expenditures of the Coast Line Company."

The Court then stated:

> "For these reasons we think the order must again be set aside and the matter reopened for further consideration by the Commission."

37 Fed. (2d) 403.

IV

POINT AT ISSUE

The point at issue is whether the figure to be entered upon the books of the Company under Account 701 "investment in road and equipment" should be on the basis of the par value of the preferred stock (approximately $5,180,344.07) plus the amount which the Atlantic Coast Line paid out in settlement of the prior claims referred to (approximately $4,080,699.80), or whether the figure should represent the value of the property received by appellee by the conveyance from the reorganization committee as above set out.

The lower court distinctly held that the figure should be ascertained upon the latter basis. No appeal was taken from that finding; it became the law of the case.

> Pierpont Mfg. Co. vs. Savannah, 153 Ga. 455, 457;
> Lucas vs. Alexander, 279 U. S. 573 (1);
> Federal Trade Commission vs. Pacific Paper Ass'n, 273 U. S. 52, 63.

This was an adjudication of the point at issue.

The Commission distinctly violated that finding in its second order and the lower court very affirmatively adhered to its original position in the second hearing.

> 37 Fed. 401, 403.

The Commission did not reconsider the case upon the basis which the Court in its final decree determined to be proper.

The order of the Commission complained of was void because of its violation of the previous adjudication of the Court on the same subject matter between the same parties which had become not only the law of the case but an adjudication of the issue.

V

THE REPORT OF THE COMMISSION IN THIS CASE IS AN ORDER

The Commission's last report began with this headnote:

> "Upon further hearing, application of Commission's accounting regulations to statement of the investment accounts of the Atlanta, Birmingham & Coast Railroad Company as of January 1, 1927, considered and *accounting prescribed.*"

It ended with the following:

> "Upon consideration of the record, as supplemented, we find and conclude that the amount to be included in the balance sheet statement of the new company representing investment in road and equipment as of January 1, 1927, may not exceed $9,261,043.87. *The company will be expected to adjust its accounts in accordance with this finding within sixty days from the service of this report.*" (Italics added.) (158 I. C. C. 6.)

If this is not an order, then the limitation of sixty days would appear to be meaningless. (37 Fed. 402 (1).) In its opinion in the last citation the court found that it was an order, saying:

> "The Court, to avoid consideration of a restraining order, requested the Commission to extend the effective date of this requirement to give time for a full hearing. The Commission did not disclaim its action as final, but did extend the time of compliance for sixty days more. We think the requirement is to be treated as an order, disobedience of which could be punished, which may be reviewed in this court for the reasons stated in our former opinion."

We must bear in mind that the original order dated December 21, 1926 (117 I. C. C. 439, 442), began with the words "it is ordered" that appellee set up its accounts in the manner stated. The present proceeding is as though that original order had been put back into force. It is very much like the case of United States vs. New River Company, 265 U. S. 533. The order of the Commission in this case requires the carrier to do an affirmative act and is, therefore, within the meaning of the statutes giving the courts jurisdiction.

Pertinent cases are:

Chicago Junction Case, 264 U. S. 258, 264;
New York Railway Co. vs. U. S., 14 Fed. (2d) 350;
New River Case, supra.

Furthermore, the word "expect" has a secondary meaning, which implies demand and not anticipation.

See Sillman vs. Spokane Savings & Loan Society,
175 Pac. 296 (Wash.).

Webster's Dictionary gives as one of the meanings of "expect", "to demand; require".

Appellee respectfully asserts that the issue in this case is controlled by the decree and order first entered, from which no appeal was taken, and that said decree was binding on the Commission; and appellee further avers that said decree and the order thereon were just and right upon the merits of the controversy.

Appellee prays that the appeal be dismissed for want of a substantial federal question.

VI

MOTION TO AFFIRM

Appellee, acting under Rule 7, paragraph 4, moves the Court to affirm the decision of the lower court for that the questions on which the decision in the cause depends are so unsubstantial as not to need further argument.

In support of this motion appellee adopts the statements heretofore made.

The order of the Commission entered on the 21st of December, 1926 (117 I. C. C. 443), refers, as we have seen,

to Commission's Account 41. Copy of this account is attached as an appendix hereto.

The court below in its first decision held that Account 41 and the proviso in the order of the Commission of December 21, 1926, come "to the same thing". (28 Fed. 885, 886, lower part of right hand column.)

Account 41 requires that

> "Where the consideration given for the property is other than cash, such consideration shall be valued on a current cash basis."

The proviso in the order of the Commission in this case of December 21, 1926, requires "that the cash value of the common stock issued must be reckoned on a basis not in excess of the amount received therefor".

Appellee received the road and equipment and other property sold at foreclosure sale in consideration of its shares of common and preferred stock. It did not purchase this property from the Atlantic Coast Line. It purchased it from the representatives of the reorganization committee, who had purchased it at foreclosure sale and who themselves had paid for it in the manner required by the decree. Appellee did not pay for this property in cash, but with its shares of preferred and common stock. The value of the property so received was the value of the shares. (28 Fed. 2d, 887.)

If the appellee should be required to enter upon its books a figure which does not represent the value of the property, it would make its books useless in ascertaining what is a fair return upon the aggregate value of its property as contemplated by Section 15a, subsection 2 of the Interstate Commerce Act, and of subsection 4 of the same section,

and of subsection 6 of the same section, which deals with the recapture of earnings. It would make nugatory the provision of paragraph 4, section 15a, which contemplates that the property investment account of the carriers will be given some consideration. Note Kansas City Southern Railway case, 231 U. S. 449. It would make the account useless in the matter of ascertaining depreciation that is contemplated by Section 20, subparagraph 5 of the Act. It would be out of harmony with Section 20, subsection 7 of the Act, which requires the carrier "to make full and correct entries in such accounts, records or memoranda of all facts and transactions appertaining to the carrier's business". It would work an especial hardship because under Section 20, subsection 7, of the Interstate Commerce Act the carrier is prohibited from keeping "any other accounts, records or memoranda than those prescribed or approved by the Commission". It would make the books of the company not only useless but very detrimental to both the carrier and the public in ascertaining the value of the property for rate-making purposes.

The power of the Commission as to accounts is to prescribe the "forms of any and all accounts, records and memoranda to be kept by the carrier under the provisions of this Act". (Sec. 20, subsection 5.)

A penalty is provided against any person who wilfully makes any false entries on the accounts or books, or who keeps "any other accounts, records or memoranda than those prescribed or approved by the Commission".

The right of the Commission under Section 20a, subsection 3, to prescribe "terms and conditions" in its orders as to the issuance of securities must not be construed to break down

other sections of the Act dealing with a specific subject in a specific way. One part of the Act must be construed in harmony with the other parts.

See: Robinson vs. B. & O. R. Co., 222 U. S. 506, 512;
Texas & Pacific R. Co., vs. Abilene Cotton Oil Co., 204 U. S. 426, 449.

A carrier's agents must swear to its reports. It would be quite an incongruity for the Commission to prescribe the contents of an oath to be taken by another. Furthermore, the "terms and conditions" referred to in this sub-division of Section 20a referred to terms and conditions pertinent to the indebtedness to be incurred or the securities to be issued, and not to subjects covered by other provisions of the Act, such as accounting and the keeping of records.

Because of the matters and things set out in the counter showing against the jurisdiction of the Court, and in this motion, appellee prays that the decision of the lower court be affirmed.

Respectfully submitted,

F. B. GRIER,
CARL H. DAVIS,
JOHN A. HYNDS,
ROBERT C. ALSTON,
Counsel for Atlanta, Birmingham & Coast Railroad Company.

Postoffice addresses:
F. B. GRIER,
CARL H. DAVIS,
Wilmington, N. C.
JOHN A. HYNDS,
ROBERT C. ALSTON,
Atlanta, Ga.

Applicable Part of the Text of Account No. 41, Mentioned in the Order of December 21, 1926

"This account shall include the cash cost of any road or portion thereof purchased. Where the contract of purchase includes not only the road, but also equipment, securities, and other assets, the appraised value of such equipment, securities, and other assets shall be deducted from the total cash cost, and the remainder of the cash cost shall be charged to this account. Where the consideration given for the property purchased is other than cash, such consideration shall be valued on a current cash basis. If the consideration includes the assumption of liabilities, such liabilities shall be included in the determination of the cost at their cash value at the time the contract is made."